IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1074

TOM PICKETTE,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner, Tom Pickette, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered on December 1, 1975, affirming a Final Judgment and Order of Conviction entered by the United States

District Court for the Southern District of West Virginia on February 7, 1975.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at _____ F.2d _____ (4th Cir. 1975), a copy of which is attached as Appendix hereto. A Petition for Review was not filed with the Court of Appeals.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 1, 1975, and a Motion for Rehearing was neither made nor entertained. An Order Extending Time to File Petition for Writ of Certiorari was made by Chief Justice Warren E. Burger on December 30, 1975. Therefore, the jurisdiction of this Court is timely envoked pursuant to 28 U.S.C. §1254 (1), which authorizes

review by Writ of Certiorari before or after a Final Judgment or Decree in cases which are in the United States Court of Appeals.

QUESTIONS PRESENTED

1. Did the Order removing Petitioner from the District of Arizona to face Trial in the Southern District of West Virginia confer proper Venue upon the latter District?

2. Did the Trial Court err by failing to suppress prejudicial evidence obtained in violation of Petitioner's rights to be free from illegal searches and seizures?

3. Did the Trial Court err by failing to exclude prejudicial testimony regarding Petitioner's alleged prior involvement in crimes other than those for which he was currently charged?

4. Was the evidence sufficient

to support Petitioner's conviction for conspiring to import and distribute quantities of marijuana?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 3, and the Fourth, Fifth and Sixth Amendments to the United States Constitution are involved.

The United States Statutes and Rules involved are contained in Title 18 U.S.C. §1952 and Rules 18 and 40 of the Federal Rules of Criminal Procedure.

Verbatim copies of the Constitutional provisions, statutes and rules referred to above appear in the Appendix to this Petition.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Tom Pickette, a numerously decorated veteran of the United States Army, was a resident of the State of

Arizona until the time of his arrest. On the afternoon of September 26, 1974, Arizona agents of the Drug Enforcement Administration were telephonically notified of an outstanding warrant for the arrest of Pickette which stemmed from a lengthy grand jury Indictment handed down in the Southern District of West Virginia. The Indictment, framed in seventeen counts, alleged the existence of a conspiracy to import large quantities of marijuana from Mexico for transportation, distribution and sale from Arizona to West Virginia and Virginia. Tom Pickette, to reflect his involvement in the conspiracy, was charged as an importer and seller. The Indictment further implicated Pickette by two substantive counts of aiding, abetting and causing travel in interstate commerce between Kanawha County, West Virginia and Arizona on two separate occasions and in

connection with an unlawful controlled substance business enterprise. Therefore, of the seventeen separate charges, Tom Pickette was named in only three counts.

Armed with this afternoon knowledge, three Drug Enforcement Administration agents dressed in casual pants and knit shirts waited over four hours before arriving at the apartment that presumably housed the Petitioner. It was then after dark. Agent William Hare knocked on the door and inquired of a man unknown to him whether Mr. Pickette was at home. The agent did not identify himself at that time. The male who answered the door, subsequently identified as Pickette, left the screened doorway and another figure, identified as Arizona resident and co-Defendant Desisto, appeared momentarily allegedly holding a pistol. Tom Pickette was neither armed nor alleged to have been brandishing a weapon at any time

during the arrest. Agent Hare jumped from the doorway, drew his automatic pistol and identified himself, whereupon the front door was closed rapidly. The agents radioed for reenforcements and upon their arrival, broke through the front door. As the agents entered, the Petitioner and Desisto fled out the back door, and both were subsequently arrested and handcuffed in the back yard.

Following this arrest outside the house, Desisto and Pickette were taken back into the apartment, searched and Desisto was questioned upon the location of the weapon. A gun was found in the roof area, through a skylight in the kitchen, and was obtained by standing on the kitchen sink, reaching on top of the roof. It was uncertain as to whether this weapon was the same as that displayed earlier in front of Agent Hare. Nevertheless, the Trial Court denied the weapon's

suppression and admitted it as a part of the Government's case over Petitioner's objections.

Following his arrest on October 11, 1974, Pickette appeared before a Federal Magistrate in Arizona for a Rule 40 Removal Hearing. The sole witness for the Government was one Terry Fink who stated that he believed that the Petitioner was the same person named in Indictment No. 74-124-CH as that person he met in Arizona solely because the names were the same. Fink did not testify with regard to Pickette, his identity or name, before the grand jury in Charleston. Indeed, Fink never met Pickette outside of Arizona. These facts, coupled with a copy of the West Virginia Indictment, were deemed by the Arizona Magistrate to be sufficient to recommend to the District Judge that a warrant of removal be issued.

Pickette did not testify at his

Trial and, with one exception, other indicted and unindicted co-conspirators testified as to the details of their Virginia and West Virginia operations and to the details of their travel to various parts of the United States to obtain marijuana for distribution and sale in the East. It should be noted that at no time did Tom Pickette leave the State of Arizona. All travel between Virginia, West Virginia and Arizona was carried on by the self-admitted conspirators residing in Virginia and West Virginia by traveling to or arranging travel to areas as far separated as Florida, Michigan and Arizona.

Indicted and admitted organizer and conspirator, Johnson, testified that his partner and co-Defendant, Thomas, came back from Arizona on one occasion with some cocaine and that Thomas said his source was Pickette. Another admitted participant in the Virginia-West Virginia

conspiracy said that unindicted co-conspirator, Terry Fink, had told him that Pickett, Desisto and Fink got together and bought an ounce of cocaine and split it up. Yet another admitted participant in the Eastern conspiracy said he purchased cocaine from a Mexican in the apartment of Pickette and Desisto. And still another admitted, but unindicted, participant, Terry Fink, said that he purchased, alone, cocaine in Pickett's apartment. This compounded testimony concerning prior unindicted acts was admitted into evidence despite strenuous objection by the Petitioner. Following the denial of post Trial Motions, the District Court sentenced Pickette on March 31 and April 1, 1975. Notice of Appeal to the United States Court of Appeals for the Fourth Circuit was filed on April 1, 1975. The Fourth Circuit Appellate Court then affirmed the decisions of the Trial

Court on December 1, 1975, whereupon, after the granting by Justice Warren E. Burger of an extension of time within which to file a Petition for Writ of Certiorari on December 30, 1975, Petitioner thereafter files this Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This case was brought into the United States District Court for the Southern District of West Virginia by virtue of its original jurisdiction to preside over such matters charged by Federal Indictment as crimes against the United States and specifically proscribed by Title 21 U.S.C. §841 et. seq. and Title 18 U.S.C. §1952 (a) (3) and 2.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE ORDER OF REMOVAL FROM THE DISTRICT OF ARIZONA WAS ERRONEOUS AND VENUE WAS LACKING IN THE SOUTHERN DISTRICT OF WEST VIRGINIA

Tom Pickette was indicted by the grand jury of the Southern District of West Virginia, and Tom Pickett, a resident of Arizona, was arrested in Tucson, Arizona, pursuant to that Indictment. A Removal Hearing was held on October 11, 1974, before a United States Magistrate and the only witness for the United States was Terry S. Fink, who identified Pickett, but who was unable to say that Tom Pickett was the same Tom Pickette named in the Indictment in the Southern District of West Virginia.

Rule 40, Federal Rules of Criminal Procedure, provides a Defendant must be identified as the person named in the Indictment before a warrant of removal

issues. The mere fact that the name of a Defendant corresponds to the name recited in the Indictment is not sufficient to justify the order of removal. In Mathues v. United States ex rel Shwartz, 19 F.2d 7 (3d Cir. 1927), it was noted that the Defendant must be identified as the party the grand jury had in mind when the Indictment was handed down. In that case, the witness testifying at the Removal Hearing as to the identity of the Defendant had not testified before the grand jury and, therefore, could not identify the Defendant as the party named in the Indictment. Removal was denied on the ground that the identity of the Defendant was not sufficiently established. Similarly, in Duffy v. Keville, 16 F.2d 828 (D. Mass 1926), it was found that the Defendant was not sufficiently described in the Indictment or identified at the Removal Hearing to establish her identity

as the party named in the Indictment. In that case, the party named in the Indictment was given a fictitious first name and there was no address listed. In the instant case, Tom Pickette is identified by name only, and there was no testimony at the Removal Hearing establishing that Tom Pickett is the Tom Pickette named in the grand jury indictment. Given the uncertainty of the only witness to appear at the Removal Hearing, it was not established that Tom Pickett was the same Tom Pickette named in the Indictment and both the order for his removal and warrant issued pursuant thereto should have been set aside.

Venue may be, and was, challenged in this removal proceeding in spite of the fact that Rule 40 appears on its fact to require only identification of the Defendant and certification of the Indictment to justify removal. In view of the

constitutional right of a Federal Criminal Defendant to be tried in the State and District in which the alleged crime was committed, removal to a District where venue is clearly absent may be denied on the ground that the Courts of the latter do not have the power to decide the case. This point was considered in United States v. Winston, 267 F.Supp. 555 (S.D.N.Y. 1967), wherein a removal was challenged on the ground that no crime had been committed by the Defendant within the District of Nebraska, the District to which removal was sought. In that case, the Defendant was charged with transmitting wagering information from New York to Nebraska, and the Court held that removal would be granted where there was uncertainty in the law as to whether the crime had been committed in Nebraska or New York, or both. In reaching its decision, however, the Court set

down a standard for testing venue in a Removal Hearing. Noting first that the Judge in a Removal proceeding performs a judicial act, the Court declared that the Judge before whom the Removal proceeding is brought "has no authority to order the removal of a Defendant to another District Court where the Indictment clearly shows, on its face, that no crime was committed in the District to which removal is sought." Id. at 560.

Article III, Section 2, Clause 3 of the United States Constitution provides, in pertinent part, that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . ." This guarantee is reiterated in the Sixth Amendment to the United States Constitution which provides, in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy

and public trial, by the impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."

Rule 18 of the Federal Rules of Criminal Procedure echoes the Constitution:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

Tom Pickette was named in three counts of the Indictment in question, and it is clear from the face of the Indictment that he was not charged with committing any crime within the Southern District of West Virginia either under Sections of the United States Code cited in the Indictment or otherwise.

As a general matter, venue in a conspiracy case may be laid in any district

in which the Defendants conspired or where any overt act occurred. Finley v. United States, 271 F.2d 777 (5th Cir. 1959). But, it is also true that in order to be considered a part of a conspiracy a Defendant must have some joint objective with his alleged co-conspirators.

There must be a specific confederation or combination of minds, for the mere association and activity with a conspirator is not sufficient to sustain a conviction. United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

For example, in United States v. Ford, 324 F.2d 950 (7th Cir. 1963), the Defendant's only act in furtherance of an alleged conspiracy was the purchase of jewelry which he evidently knew was stolen. The Court held that the mere purchase of contraband did not make the Defendant a co-conspirator. In important language, the Court, id. at 952, reasoned:

> "The relationship of a buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."

Judge Learned Hand, in United States v. Zeuli, 137 F.2d 845 (2nd Cir. 1943), mandated the doctrine that if the crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of conspiring to commit such crime. This principle was further expoused where one Defendant's delivery of cocaine to another was held to be insufficient to support the inference of knowledge of a broader conspiracy on the part of the two Defendants. United States v. Sperling, 506 F.2d 1323

(2nd Cir. 1974). See also Gebardi v. United States, 287 U.S. 112, 122 (1932); United States v. Katz, 271 U.S. 354, 355 (1926).

In the instant case, there is neither anything in Indictment nor anything in evidence indicating Pickett's relationship to the confessed co-conspirators was anything other than that of casual acquaintance or, for argument's sake and at most, that of buyer and seller. In United States v. Koch, 113 F.2d 982, 983 (2d Cir. 1940), a case in which conspiracy was alleged upon the basis of Defendant's purchase of illegal drugs, the Court said:

> "The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price.

> The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators."

The principle that a conspirator must have a joint interest with his co-conspirators has been stated alternatively in United States v. Dire, 159 F.2d 818 (2nd Cir. 1947), affirmed, 332 U.S. 581. There, the Second Circuit, in discussing a case involving a conspiracy to deal in counterfeit gasoline coupons, established the following criteria for determining whether or not a Defendant is a participant in a conspiracy. The Court stated, id. at 819:

> "We have several times had occasion to consider what relationship to a conspiracy makes a man a confederate, and what relationship to the principles in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the

> principles in the sense that he has a stake in the success of the venture. When the Supreme Court affirmed in United States v. Falcone, [311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128], it held that the sale of material to those who the seller knows will use it to commit a crime does not make the seller a party to a conspiracy of the buyers."

In the present case, it is alleged that Tom Pickette sold quantities of marijuana to persons who subsequently transported the marijuana to West Virginia. However, assuming arguendo there was a sale, neither the Indictment nor the evidence manifests any interest that the Petitioner could have had in the success of any ventures which took place after the supposed sale. Again, ". . . neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proof of participation in a conspiracy." United States v. Webb, 359 F.2d 558, 562 (6th Cir.),

cert. den., 385 U.S. 824 (1966). Accord, United States v. Falcone, supra; Diaz-Rosenado v. United States, 364 F.2d 941 (9th Cir. 1966); cf. United States v. Kelton, 446 F.2d 669 (8th Cir. 1971). These cases provide a further bench from which Petitioner contends that venue did not lie with regard to the charges of aiding and abetting.

The use of interstate transportation in the aid of racketeering enterprises is prohibited by 18 U.S.C. §1952. That statute specifically prohibits travel in interstate commerce in order to aid any unlawful activity. Neither the Indictment nor the evidence disclose that Pickette ever traveled in interstate commerce in furtherance of this goal. Therefore, these charges rest upon the allegation that he used some facility of interstate commerce to further his purported illegal goal. It becomes of primary

importance, then, to define the word "uses" as it appears in 18 U.S.C. §1952. Case law gives it a simple definition. In United States v. Miller, 379 F.2d 483 (7th Cir.), cert. den. 389 U.S. 930 (1967), the Court stated that the term

> "is to be given its ordinary meaning and means to carry out a purpose or action by means of; make instrumental to an end or process; apply to advantage; and is synonymous with employ, utilize, apply and avail."

This definition certainly is not consistent with the acts alleged to have been committed by Tom Pickette in the case at bar.

Dire and Webb, supra, again supply further language which bears upon this particular statute. The use of a facility of interstate commerce clearly requires a continuous interest on the part of the Defendant in the success of

the alleged venture. The Court in United States v. Lane, 514 F.2d 22, 26-27 (9th Cir. 1975) quoted strong precedent of old:

> ". . . In order to aid and abett another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about that he seek by his action to make it succeed.' L. Hand, J. in United States v. Peoni, 100 F.2d 401, 402 (2nd Cir.). Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)." [emphasis added].

A Defendant must take some affirmative action in causing a facility of interstate commerce to be used in order to be subject to the sanctions of Section 1952. United States v. Hedge, 462 F.2d 220 (5th Cir. 1972); United States v. Cianchetti, 315 F.2d 584 (2nd Cir. 1963). See also United States v. Johnson, 513 F. 2d 819 (2nd Cir. 1975); United States v. Cirillo, 499 F.2d 872 (2nd Cir. 1974); United States v. Mallory, 460 F.2d 243

(10th Cir.), cert. den., 409 U.S. 870 (1972); United States v. Harris, 441 F.2d 1333 (10th Cir. 1972).

In the present set of circumstances, Pickett is not charged with having taken any affirmative action other than the sale of contraband. This fact in no way can be said to cause the use of an interstate facility for the transportation of contraband. His interest in the venture terminated as of the date of the alleged sale. There being no conduct of Petitioner amounting to either a conspirator or an aider and abettor, venue was lacking in West Virginia and removal should have been disallowed.

Lastly, the fact that the Petitioner ultimately went to Trial in the Southern District of West Virginia, cannot be construed as amounting to a waiver of the issue of venue. Submission under a warrant of compulsion and transfer by

United States Marshalls can hardly be equated with the type of conduct necessary for the voluntary relinquishment of a right such as is due in this context. By contesting removal itself, the Petitioner entered his objection to the acquisition by West Virginia of jurisdiction over his person. Such contest should automatically transfer with the person to the transferee jurisdiction. By a Motion to Dismiss the Petitioner contested the fact of probable cause for believing him guilty of a crime. This element is also a part and parcel of the criteria for removal. Therefore, if Petitioner wished to challenge his Indictmentm and thereby his removal, he had to submit to the transferee jurisdiction. But if such action amounts to a waiver of improper venue, then there is no way he could attack the fact of illegal removal, for the transferor jurisdiction cannot quash an Indictment and grant a dismissal,

United States v. Green, 499 F.2d 538 (D.C. Cir. 1974), nor is a removal warrant appealable or reviewable in the district where Petitioner was arrested. United States v. McCray, 458 F.2d 389 (9th Cir. 1972); United States v. Woodring, 446 F.2d 733 (10th Cir. 1971); United States v. Perkins, 433 F.2d 1182 (D.C. Cir. 1970); United States v. Sherriffs, 64 F.R.D. 729 (E.D. Wis. 1974); United States v. Richardson, 57 F.R.D. 196 (E.D.N.Y. 1972). Such is the compounded dilemma produced by the contradicting policies inherent in Rule 40 of the Federal Rules of Criminal Procedure. Petitioner's Motion to Dismiss the Indictment in the present case was denied. The waiver of venue may not then stand upon the stringy ground of whether he verbally plead not guilty to the charge or else stood mute and had such a plea entered on his behalf. Petitioner's course of conduct manifested his desire

not to submit to the improper venue around which the Trial revolved.

ARGUMENT II

THE COURT'S FAILURE TO SUPPRESS EVIDENCE OBTAINED WITHOUT A SEARCH WARRANT WAS PREJUDICIAL ERROR

In the present case, Pickette was arrested in the patio or back yard of a house. The entire house was searched and a gun was finally located and retrieved by an agent who stood on a sink, lifted a ceiling light cover or unit and reached onto the roof area of the house. It must be noted at the outset that Pickett's capture was effectuated pursuant to an "arrest" warrant and that the agents were not simultaneously armed with a judicially approved warrant to conduct a search of the premises. Then, for the weapon to be admitted into evidence, it must necessarily enter through one of the narrow and well-defined exceptions to the requirement

that a warrant must be obtained for a constitutionally permissive search of a dwelling. As was stated by this Court in Katz v. United States, 389 U.S. 347, 357 (1967):

> "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per say, unreasonable under the Fourth Amendment --subject only to a few specifically established and well-delineated exceptions."

The burden rests upon the Government to show the existence of such an exceptional situation. Chimel v. California, 395 U.S. 752 (1969). In the absence of such a showing, the evidence so obtained must constitutionally be excluded from reception as violative of the Fourth Amendment to the United States Constitution. Petitioner contends that his right to be secure from unreasonable searches and seizures was intruded upon in the instant case.

There was no consent to search. The doctrine of "hot pursuit," Warden v. Hayden, 387 U.S. 294 (1967), is inapplicable for there was no "fleeing felon" to be arrested. Petitioner was already in custody by the time the search commenced. The only rationale upon which the Government could predicate an argument to substantiate the conduct of its agents here is by contending that the search was lawful as incident to a valid arrest. But such a notion is as brittle as a dry leaf.

This Court has developed the permissable scope of a search incident to an arrest through cases such as Chimel v. California, supra, and Vale v. Louisiana, 399 U.S. 30 (1970). Chimel limited this scope to the area from within which a person might gain possession of a weapon or destructible evidence. And even as the Supreme Court of the United States was sculpting this landmark decision, it

interpreted its position that same term in another case similar to the one at hand. In Shipley v. California, 395 U.S. 818 (1969), the Defendant was arrested as he alighted from his car. Both he and the automobile were searched. The police then entered his home for the purpose of conducting a warrantless search. The Shipley Court, id. at 320, stated that

> ". . . the Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless earch. On the contrary, it has always been assumed that one's house cannot lawfully be searched without a search warrant except as incident to lawful arrest therein."

See also James v. Louisiana, 382 U.S. 36 (1965). Even when a search incident to arrest is permitted inside a dwelling, it must be carefully limited. Chimel v. California, 395 U.S. 752 (1969).

In Vale v. Louisiana, 399 U.S. 30 (1970), officers arrested Vale on the front steps of his home after he had sought to escape arrest by hurriedly entering the house. The officers informed Vale that they were going to search his house, and thereupon advised him of his constitutional rights. Narcotics were found in a rear bedroom. The Vale Court mandated, id. at 33-34, that

> "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, cf. Agnello v. United States, 269 U.S. 20, 32, not somewhere outside--Whether two blocks away . . . or on the sidewalk near the front steps. 'Belief, however well-founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.' Agnello v. United States, supra, at 33. That basic rule 'has never been questioned in this Court.' Stoner v.

California, . . ."

That Court continued by declining to hold "that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." Id. at 35. Accord, United States v. Goad, 426 F.2d 86 (10th Cir. 1970); United States v. Holsey, 414 F.2d 458 (10th Cir. 1969).

It is impossible to construe Petitioner Pickett's actions as providing the 'exigent circumstances' necessary for a warrantless search. Indeed, the Federal agents here cannot avail themselves of conduct specifically proscribed by several decisions of this Court. See also United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973). Recently, the Court of Appeals for the Ninth Circuit reflected upon an analogous set of facts. In United States v. Basurto, 497 F.2d 781

(9th Cir. 1974), the Defendant was arrested in front of his home by two Customs agents. After he was placed under arrest, Basurto turned toward the house and yelled, "It's the police." Immediately, an agent who did not have a search warrant, ran to the front door, opened it and entered the house. The agent testified that he entered to see if anyone was inside and to see if anyone inside had weapons. While inside the agent discovered incriminating evidence. After careful examination of Supreme Court decisions, see also Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Ninth Circuit refused to condone the search.

From the foregoing discussion, it is evident that Petitioner Pickett's constitutional rights were substantially infringed upon by the admission of the weapon into evidence. The inquiry must now turn to the prejudicial effect of such evidence.

Under the guidelines of Chapman v. California, 386 U.S. 18 (1967) a Governmental violation of a Defendant's constitutional rights does not require a reversal of the conviction if the violation constitutes "harmless error." The Court in Chapman adopted the test of Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) to determine whether an error is harmless.

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction . . . An error in admitting plainly relevant evidence which possibly influenced the jury adversely to the litigant cannot, under Fahy, be conceived of a harmless, [and] the beneficiary of the error [must] prove beyond a reasonable doubt that the improperly admitted evidence did not contribute to the conviction. Chapman, supra, at 23-24.

The Government in the case at hand has not met the burden of showing beyond a reasonable doubt that the

admission in evidence of a gun, purportedly brandished at the time of arrest by a co-Defendant being tried jointly with Pickett, did not contribute to the Petitioner's conviction. This was a prosecution not involving force or weapons. Society manifests a strong consternation and concern toward those that wield deadly weapons, and where the prosecution herein concerns trafficking in marijuana and bears no reasonable relation to charges involving deadly weapons, the only possible effect of the introduction of the gun coupled with the testimony of the circumstances of arrest is the prejudicial and inflamatory value of associating the Petitioner with the weapon in order to propel a guilty verdict. A conviction based upon such horror-envoking ploys mocks the very foundation of our judicial system. Compare Stoner v. California, 376 U.S. 483 (1964) reh. den., 377 U.S. 940 (1965) with

Bumper v. North Carolina, 391 U.S. 543 (1968). See also Bowling v. United States, 350 F.2d 1002 (D.C. Cir. 1965); Binge v. United States, 333 F.2d 210 (9th Cir. 1964); Green v. Yeager, 223 F.Supp. 544 (D.C.N.J. 1963) affd. per curiam, 332 F.2d 794 (3rd Cir. 1964); Moscow v. United States, 301 F.2d 180 (9th Cir.), 371 U.S. 842 (1962); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961). A reversal of Petitioner's conviction is necessitated.

ARGUMENT III

THE ADMISSION OF TESTIMONY CONCERNING PURPORTED COCAINE TRANSACTIONS WAS PREJUDICIAL ERROR

It is a cardinal principle of the common law that the prosecution may not use evidence of prior criminal acts in its case-in-chief to prove that the Defendant committed the crime for which he is presently charged. See Michelson v. United States, 335 U.S. 469 (1948);

United States v. Lawrence, 480 F.2d 688 (5th Cir. 1973). This is a just and wise general rule in order to avoid the enormous danger of prejudice to a Defendant that the evidence of prior crimes creates. Exceptions have been carved out, however, to serve a limited prosecutorial and judicial purpose, but these should not be permitted to engulf the rule. See United States v. San Martin, 505 F.2d 918 (5th Cir. 1974) and cases cited therein; United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974) cert. denied, 95 S.Ct. 1427 (1975). Where the evidence of other acts tends to prove some element of the crime presently charged, and therefore, is not offered to show the Defendant's bad character, it can be properly received. United States v. Pittman, 439 F.2d 906 (5th Cir.), cert. denied, 404 U.S. 842 (1971); L. Wright, Federal Practice & Procedure: Criminal §410 (1969). Similary, evidence of other

acts of misconduct is regarded as admissible for the purpose of showing knowledge, intent, motive, design, scheme or the like, where such is an essential element of the commission of the offense. See United States v. Crockett, 514 F.2d 64 (5th Cir. 1975). But before one of these exceptions may properly be invoked, the Trial Court must be satisfied that several threshold prerequisites have been met. As formulated in United States v. San Martin, supra, at 921-922:

> "1. Proof of the prior similar offenses must be 'plain, clear and convincing;'
>
> 2. The offenses must not be too remote in time to the alleged crime;
>
> 3. The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;
>
> 4. There must be a

> substantial need for the probative value of the evidence provided for by the prior crimes. United States v. Cavallino, 498 F.2d 1200, 1206 (5th Cir. 1974). If all of these prerequisites are satisfied, and if it appears on balance that the need for such evidence outweighs the prejudicial effect it is likely to have, then the evidence is admissible." [emphasis added]

By applying this test to the case before the Court, it is apparent that the evidence cannot be said to be "plain, clear and convincing," because only the fact of the offenses and not their circumstances were introduced. It is not clear, for example, from the record that any of the prior acts included specific intent as a material element; "prior crimes requiring only general intent are of meager, if any, probative value concerning the later existence of specific intent." United States v. San Martin, supra, at 922.

Further, there was no "substantial" need for the probative value of the evidence. Indeed, it can be said that the prejudicial effect of the testimony clearly outweighed any need for its introduction. By denying the admissibility of such evidence, the Court does not presume that character is irrelevant. Rather that it weighs too much with a jury and persuades them to prejudge one with a bad general record. This results in the denial of a "fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 467, 475-76 (1948).

The evidence that Pickett engaged in other criminal activities on other occasions, did not come within any of the above proferred exceptions to the Michelson rule. The extreme damage and prejudice resulting therefrom could not be removed by any curative instructions. See United States v. Stover, 492 F.2d 1367

(6th Cir. 1974); United States v. Rudolph, 403 F.2d 805 (6th Cir. 1968).

ARGUMENT IV

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION

In a conspiracy case, the record must be carefully scrutinized for evidence of intent. Anderson v. United States, 417 U.S. 211 (1974). A conspiracy indictment involving numerous persons in which proof at Trial indicated three separate conspiracies with only two or three of the Defendants common to all conspiracies caused the Court in United States v. Varelli, 407 F.2d 735, 747 (7th Cir. 1969) to reverse a host of convictions:

> "The jury was not properly instructed in order that they could find multiple conspiracies and still find the defendants guilty. Without being properly instructed, it was possible for the jury to transfer guilt from one to another and to find defendants guilty of an overall conspiracy. . . We find it necessary

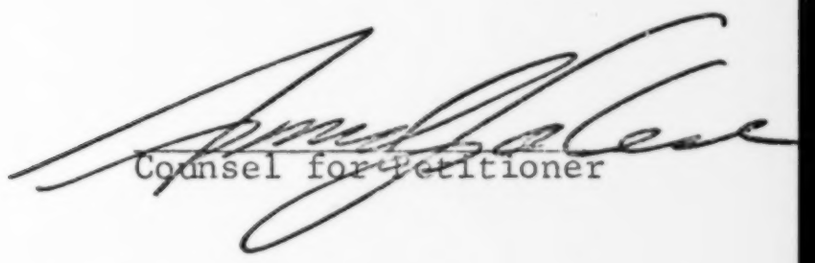
> to void the convictions . . . because their rights were substantially prejudiced by a single Trial without proper instructions."

From this common occurrence, Tom Pickette submits that he too is entitled to a retrial, in the appropriate district, on the conspiracy and substantive counts, for the overwhelming guilt of the convicted conspirators most assuredly transferred to him. The overall tone of the Government's conduct was an effort to bulldoze the jury. The risk of guilt-transferance was high and compounded by the totality of prejudicial testimony. Due Process of Law imperatively calls for a reversal of his conviction.

C O N C L U S I O N

For the reasons stated, the Petition for a Writ of Certiorari should be granted, and the Judgment and Order of the United States Court of Appeals for the Fourth Circuit in this case should be reversed.

Respectfully submitted,



Counsel for Petitioner

DATED January 26, 1976.

A P P E N D I X

ARTICLE III, SECTION 2, CLAUSE 3 CONSTITUTION OF UNITED STATES

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress made by Law have directed."

CONSTITUTION OF UNITED STATES

AMENDMENT [IV.]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT [V.]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT [VI.]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. §1952

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances

(as defined in section 102 (6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, §701 (i) (2), Oct. 27, 1970, 84 Stat. 1282."

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 18

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

RULE 40

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District; Removal

(a) Arrest in Nearby District. If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate; preliminary proceedings shall be conducted in accordance with Rules 5 and 5.1; and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a federal magistrate in the district of the arrest in accordance with provisions of Rule 9(c) (1).

(b) Arrest in Distant District.

(1) Appearance before Federal Magistrate. If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate in the district in which the arrest was made.

(2) Statement by Federal Magistrate. The federal magistrate shall inform the defendant of the rights specified in Rule 5(c), of his right to have a hearing or to waive a hearing by signing a waiver before the federal magistrate, of the provisions of Rule 20, and shall authorize his release under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148.

(3) Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, a judge of the United States shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the federal magistrate shall hear the evidence. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If a United States magistrate hears the evidence he shall report his findings and recommendations to a judge of the United States. If it appears from the United States magistrate's report or from the evidence adduced before the judge of the United States that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. There is "sufficient grounds" for ordering removal under the following circumstances:

(A) If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.

(B) If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

(C) If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense is alleged to have been committed is presented.

(4) Bail. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending under the terms provided for by these rules and by 18 U.S.C. § 3146 and § 3148. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(5) Authority of United States Magistrate. When authorized by a rule of the district court, adopted in accordance with 28 U.S.C. § 636(b), a United States magistrate may issue a warrant of removal under subdivision (b) (3) of this rule.

As amended Apr. 24, 1972, eff. Oct. 1, 1972.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1453

United States of America,

Appellee,

versus

Tom Pickette,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
K. K. Hall, District Judge.

Argued November 14, 1975 Decided **Dec. 1, 1975**

Before CLARK, United States Supreme Court Justice, Retired,*
BRYAN, Senior Circuit Judge, and CRAVEN, Circuit Judge.

John Troelstrup [Court-appointed] (Weaver and Troelstrup on brief) for Appellant; John A. Field, III, United States Attorney (Robert B. Allen, Assistant United States Attorney, on brief) for Appellee.

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* Sitting by designation.

PER CURIAM:

This is an appeal from the verdict of a jury establishing Pickette's membership and activity in a conspiracy to distribute marijuana and sell it in West Virginia and other states.

The removal of the defendant from Arizona to West Virginia for trial, and venue in West Virginia, were proper and in accord with established law. It was not error to admit evidence of similar crimes for the limited purpose of showing mens rea. Nor is there any merit to the contention that officers had no right to search for and seize a gun that had been brandished by one of the defendants moments before in an attempt to prevent entry to the premises. The direct testimony of guilt was overwhelming.

AFFIRMED.

PROOF OF SERVICE

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

I, ARMAND SALESE, Attorney of record for TOM PICKETTE, Petitioner, depose and say that on the 27 day of January, 1976, I served three copies of the foregoing Petition for Writ of Certiorari on the Solicitor General, Department of Justice, Washington, D.C. 20530, and three copies of the foregoing Petition for Writ of Certiorari on John A. Field, III, United States Attorney, Federal Building, 500 Quarrier Street, Charleston, West Virginia 25301, Respondents herein, by depositing the same in a United States Post Office Mail Box, with first class postage prepaid, (express), addressed to the above and the above addresses.

Armand Salese

THE FOREGOING Proof of Service was subscribed and sworn to before me this 27th day of January, 1976, by ARMAND SALESE.

Notary Public

My commission expires:

7/28/78

No. 75-1074

In the Supreme Court of the United States

OCTOBER TERM, 1975

TOM PICKETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 53-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1975. On December 30, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to January 30, 1976, and the petition was filed on January 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's removal to the Southern District of West Virginia was proper.

2. Whether the trial court properly admitted in evidence a weapon seized at the time of petitioner's arrest.

3. Whether evidence of prior similar criminal acts was admissible.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conspiring to distribute marijuana, in violation of 21 U.S.C. 846, and on two counts of causing the interstate shipment of marijuana, in violation of 18 U.S.C. 1952(a)(3) and 2. He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a special parole term of two years on the conspiracy count. The court of appeals affirmed (Pet. App. 53-54).

The evidence showed that petitioner participated in a well-organized scheme to transport large quantities of Mexican marijuana from Tucson, Arizona, to Virginia and West Virginia, where it was distributed to others. Petitioner acted as the "Arizona connection." Others involved in the scheme were Calvin Thomas, who co-ordinated each shipment with petitioner; Patrick Johnson, who hired the drivers to transport the marijuana from Arizona to Virginia and West Virginia and directed its distribution there (Tr. 81); and Jessie Garrett and Terry Fink, who distributed the marijuana in West Virginia.[1]

[1]On September 26, 1974, petitioner, Johnson, Thomas and others were indicted in the United States District Court for the Southern District of West Virginia. Following a removal hearing on October 11, 1974, in the United States District Court for the District of Arizona, petitioner was removed to West Virginia. Johnson subsequently pleaded guilty and testified for the government; Thomas remained a fugitive throughout these proceedings. Garrett and Fink were named as unindicted co-conspirators and testified for the government at petitioner's trial.

In July of 1973, Calvin Thomas met with petitioner in Tucson, Arizona, in order to establish a source of Mexican marijuana (Tr. 68, 75-76). Once Thomas learned that petitioner could supply the desired quantities, he informed Patrick Johnson (Tr. 69, 75-76). Johnson in turn met with petitioner to discuss future transactions (Tr. 69, 78-79). Thomas remained in Arizona to co-ordinate with petitioner the delivery of marijuana from Mexico and to arrange for its loading into automobiles for delivery to Virginia and West Virginia. Approximately eleven loads of marijuana, each weighing about 250 to 300 pounds, were transported interstate by automobile (Tr. 96).

Each of the drivers hired to transport the marijuana customarily was paid $500 per trip (Tr. 344, 364, 504, 509). Petitioner frequently met with the drivers (Tr. 337, 360, 365, 467, 476, 505, 511, 585, 665-667) and sometimes discussed the purchase of marijuana with them (Tr. 592, 596-601, 669-674). Occasionally, the drivers purchased marijuana for their own use directly from petitioner (Tr. 602, 669-674). At times, petitioner suggested to co-conspirators Johnson and Thomas (Tr. 149-150) and to one of the drivers (Tr. 341, 348) the best routes to travel out of Arizona in order to avoid police detection.

In West Virginia, the marijuana was distributed by Garrett and Fink (Tr. 341-343, 661), both of whom knew petitioner was the "Arizona connection" for the marijuana (Tr. 542, 560, 571, 740-749). Fink testified about his numerous meetings with petitioner at which the marijuana scheme was discussed (Tr. 740-749).

ARGUMENT

1. Petitioner contends (Pet. 12-29) that his removal to the Southern District of West Virginia was improper

because he was not identified at the removal hearing as the person named in the indictment. He also claims that there was no venue in that district because he did not commit any crime there.

a. At the removal hearing, Fink testified that he was an unindicted co-conspirator in the West Virginia indictment and that he had testified before the grand jury there. He further stated that he was present at six meetings with petitioner in Tucson, Arizona, at which the co-conspirators discussed the delivery, quantity and price of the marijuana (H. Tr. 7-10).[2] At the first of these meetings, co-conspirator Thomas introduced Fink to petitioner, describing Fink as a driver who would transport marijuana to West Virginia (H. Tr. 9).

Since the indictment charged that Tom Pickette sold marijuana in Tucson, Arizona, to Calvin Thomas, Terry Fink and others and that the marijuana was transported by automobile to West Virginia and Virginia, the magistrate justifiably found (H. Tr. 20) on the basis of the evidence before him, that petitioner was the Tom Pickette named in the indictment. There was no occasion for Fink to express an opinion on that issue, because that was the ultimate question for the magistrate to decide (H. Tr. 10-11). See *Horner* v. *United States*, 143 U.S. 207, 215.

b. Contrary to petitioner's claim (Pet. 17) that he was not charged with committing any crime within the Southern District of West Virginia, the indictment charged him with conspiring to distribute marijuana in that district. Since venue in a criminal conspiracy prosecution lies in any district in which an overt act occurred (*Hyde*

[2]"H. Tr." refers to the transcript of the removal hearing held on October 11, 1974, in the District of Arizona.

v. *United States*, 225 U.S. 347, 367), the indictment was properly returned in the Southern District of West Virginia, because the evidence shows such an act took place there, namely, the delivery and distribution of marijuana (Tr. 82-99). See, *e.g.*, *United States* v. *Overshon*, 494 F.2d 894, 900 (C.A. 8), certiorari denied, 419 U.S. 853, 878. Moreover, since the proof under 18 U.S.C. 1952(a)(3) demonstrated that petitioner caused the interstate transportation of marijuana into the Southern District of West Virginia, venue was proper there under 18 U.S.C. 3237(a).

2. Petitioner argues (Pet. 29-38) that his co-defendant's gun, which was introduced in evidence, was seized during an unlawful search of an apartment which they shared.

Agents of the Drug Enforcement Administration received information from their office in Charleston, West Virginia, that arrest warrants were outstanding for petitioner and co-defendant Stanley Desisto (Tr. 419, 778-779). Pursuant to this information, they went to an apartment in Tucson, Arizona, where petitioner and Desisto were believed to be residing with a third person (Tr. 382-383, 423, 779). Agent William Hare, who was dressed in civilian clothes (Tr. 421-422), knocked on the front door of the apartment while another agent watched the back entrance.

When petitioner answered the door, Agent Hare, who did not know him, asked whether Mr. Pickette (petitioner) was there (Tr. 384, 408, 780). A few moments later co-defendant Desisto, whom Hare recognized,[3] appeared at the door and pointed a gun at the agent's head (Tr. 382, 384, 388-389, 425). Hare immediately

[3]In January of 1972, Desisto had been arrested by federal narcotics agents. Agent Hare recognized him from a photograph which he had seen at that time (Tr. 382).

identified himself as a federal agent (Tr. 384, 781). Petitioner and Desisto thereupon pushed the door shut and turned out the lights in the apartment (Tr. 385, 781). At that point, the agents summoned help.

Fifteen minutes later, local police officials and a police helicopter arrived (Tr. 782). Agent Hare yelled numerous warnings to petitioner and Desisto that they were federal agents and had warrants for their arrests (Tr. 844). When the agents received no response, they forcibly entered the apartment. Petitioner and Desisto fled out the back entrance and were arrested (Tr. 386, 782).

At the time of arrest, an agent advised petitioner and Desisto of their rights (Tr. 411-412, 821-822). Both defendants were searched and neither was armed (Tr. 386). The apartment was searched to determine whether a third person was present and armed (Tr. 386). Neither a third person nor the gun that Desisto had pointed at Agent Hare was found. Desisto was then asked where the gun was (Tr. 386-387, 787). Desisto told the agent that the gun was hidden in a skylight in the kitchen (Tr. 387). The agent went back into the apartment and seized the gun from the skylight (Tr. 387-388).[4]

Since the agents had information that a third person might be residing with petitioner and Desisto, and since the agents knew that Desisto had been armed only moments before the arrest, they reasonably concluded that immediate entry was necessary to determine whether that third person, who might be armed, was present. See, *e.g.*, *United States* v. *Holiday*, 457 F.2d 912

[4]The agent found two guns (Tr. 388). The court permitted the government to disclose to the jury that Desisto was armed when the agents arrived at his apartment and that the gun was found there, but it further instructed the prosecution not to introduce any testimony about the second gun (Tr. 439).

(C.A. 3), certiorari denied, 409 U.S. 913. " '[T]he exigencies of the situation made that course [of conduct] imperative' " and reasonable for the agents' own protection. *Warden* v. *Hayden*, 387 U.S. 294, 298-299, quoting *McDonald* v. *United States*, 335 U.S. 451, 456.

Nor did the exigencies of the situation cease once the initial search had indicated that apparently there was no one else in the apartment. Since neither defendant had the gun on his person, the agents knew that it had been hidden somewhere in the apartment and that it therefore continued to present a threat to their safety.[5] In these circumstances, it was reasonable for one of the agents to ask Desisto where he had hidden the gun and to seize it when its location was disclosed.

Moreover, Desisto consented to the seizure. He had been given *Miranda* warnings and responded that he understood; he also was aware that the agents had been unable to locate the weapon. Yet in response to a simple non-coercive question, he disclosed the location of the gun. In the "totality of all the circumstances" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227), his consent was voluntary, and the mere fact that he was in custody did not vitiate that voluntary consent. *United States* v. *Watson*, No. 74-538, decided January 26, 1976, slip op. at 13.

Furthermore, the gun was evidence of a crime that had been committed only moments before. As the court of appeals correctly found (Pet. App. 54), the gun "had been brandished by one of the defendants moments before

[5]Although a third person was not found in the apartment, the agents were uncertain whether petitioner and Desisto lived there alone. Since there had been a ten to fifteen minute delay between the time Agent Hare identified himself as a federal agent and their entry into the apartment, Desisto had sufficient opportunity to contact that third person, or even someone else.

in an attempt to prevent entry to the premises." Notwithstanding Desisto's apparent lack of knowledge that Agent Hare was a federal agent, his act of pointing a weapon at Hare's head was an assault on a federal officer. *United States* v. *Feola*, 420 U.S. 671. In these circumstances, once Desisto disclosed the gun's location, it was reasonable for the agents to seize the gun immediately without a warrant. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 51-52.[6]

3. The trial court properly admitted evidence concerning prior similar criminal activity, specifically, a purchase of cocaine from petitioner (Tr. 104, 154-155), a similar purchase by co-conspirator Fink and petitioner from an unnamed Mexican (Tr. 543, 748-749) and a purchase of cocaine by one of the hired drivers from a Mexican at petitioner's apartment (Tr. 588-589). The court carefully instructed the jury that these similar acts were admissible only to show intent (Tr. 918, 927-929).

Petitioner concedes (Pet. 39) that evidence of similar criminal activity is admissible "to prove some element of the crime presently charged," such as intent. But he contends that the evidence here was inadmissible because it was not "plain, clear and convincing" (Pet. 41) and the prejudicial effect of this evidence "clearly outweighed any need for its introduction" (Pet. 42).

The admissibility of evidence of prior crimes is within the trial court's discretion. See, *e.g.*, *United States* v.

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[6]In any event, even if the trial court erred in admitting the gun and testimony about it into evidence, it was harmless error. *Chapman* v. *California*, 386 U.S. 18, 21-24. The evidence, wholly independent of the gun, that petitioner participated in a conspiracy to distribute marijuna and caused its interstate shipment was, as the court of appeals correctly found (Pet. App. 54), overwhelming.

Crockett, 514 F. 2d 64, 72 (C.A. 5). There was no abuse of discretion here. The prior cocaine purchases involved participants in the conspiracy charged here and, in fact, occurred during that conspiracy. Evidence of each transaction was "clear and convincing" in that either the witness himself had made the purchase or a fellow co-conspirator, who had purchased the drug, related that information to the witness. These witnesses not only testified that the purchases had been made, but they also stated the persons involved (Tr. 104, 543, 588, 749), the place of the transaction (Tr. 103-104, 543, 588, 748), and, on at least one occasion, the purchase price (Tr. 749).[7] Furthermore, the trial court did not abuse its "wide range of discretion" in concluding that the probative value of the evidence outweighed its inherent

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Petitioner's assertion (Pet. 41) that the evidence was not "clear and convincing" because the record does not show whether the prior acts were specific intent crimes is insubstantial. The sale or purchase of a controlled substance proscribed by 21 U.S.C. 841(a)(1), or aiding and abetting such a transaction, requires the same type of intent as the crime charged here—conspiring to distribute a controlled substance in violation of 21 U.S.C. 846. *Ingram* v. *United States*, 360 U.S. 672, 678.

Petitioner's reliance on *United States* v. *San Martin*, 505 F. 2d 918 (C.A. 5), to show that the evidence of the prior criminal activity was insufficient "because only the fact of the offenses and not their circumstances were introduced" (Pet. 41) is misplaced. In *San Martin* the issue was whether the defendant intended to assault an FBI agent, or whether he did so accidentally. The court emphasized that "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent." *Id.* at 923. Accordingly, the court held that the mere recital that a conviction occurred, without setting forth the circumstances involved, had more to do with the defendant's overall disposition or character than with the type of intent necessary to commit the offense charged. Here, in contrast, the intent involved a conspiracy to distribute narcotics and the interstate transportation of the drug, and the circumstances of the prior criminal acts were stated.

prejudicial effects. *United States* v. *Crockett, supra,* 514 F. 2d at 72.

4. Finally, petitioner contends (Pet. 43-44) that the evidence was insufficient to sustain his conviction, because, he says, only a buyer-seller relationship, not a conspiratorial agreement, existed between him and his co-defendants. He concedes (Pet. 44) that the evidence against his co-defendants was "overwhelming."[8] However, viewing the evidence most favorably to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), it supported the jury's verdict against petitioner on each of the three counts; indeed, the petitioner's involvement in the conspiracy, like that of his co-defendants, was "overwhelming."

The conspirators were involved in a large scale distribution scheme, a necessary concomitant of which was a source of Mexican marijuana, which petitioner provided. After meetings with co-conspirators Thomas and Johnson in July of 1973, he agreed to supply the marijuana. His relationship to and interest in the scheme did not cease after a single sale but extended over a series of transactions. Petitioner maintained contact with his fellow co-conspirators throughout the conspiracy and personally met with them on numerous occasions to discuss the availability and price of large quantities of marijuana.

Thus, petitioner participated in an integral and active way in the scheme. He "intended to participate in it"

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[8]Relying on *United States* v. *Varelli,* 407 F.2d 735, 747 (C.A. 7), appeal after remand, 452 F.2d 193, certiorari denied *sub nom. Saletko* v. *United States,* 405 U.S. 1040, petitioner contends (Pet. 43-44) that his conviction must be reversed because of a prejudicial transference of his co-defendants' "overwhelming" guilt to him. The prejudice arose in *Varelli,* however, because of a variance in the number of conspiracies charged and those proven. That situation did not exist here.

(*United States* v. *Cirillo,* 499 F.2d 872, 883 (C.A. 2), certiorari denied, 419 U.S. 1056), sought "to further its purposes" (*United States* v. *Cianchetti,* 315 F.2d 584, 588 (C.A. 2)) and had a stake in its outcome.

Moreover, contrary to petitioner's contention (Pet. 23-26), the evidence showed that he aided and abetted and caused the use of interstate commerce to carry out the distribution scheme, in violation of 18 U.S.C. 1952(a)(3). Petitioner was aware that the marijuana would travel interstate by automobile, and he coordinated with co-conspirator Thomas the importation of the marijuana and its loading into automobiles for shipment to Virginia and West Virginia. He also advised the participants about safe routes to take out of Arizona in order to avoid detection by the police. Petitioner's interest in the success of the venture did not, as he contends (Pet. 26), terminate at the conclusion of each sale.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JEROME M. FEIT,
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Attorneys.

APRIL 1976.

DOJ-1976-04